BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

JESSE ATKINS	)	
Claimant	)	
	)	
VS.	)	
	)	
WEBCON, INC.	)	
Respondent	)	Docket No. 1,047,783
	)	
AND	)	
	)	
KANSAS BLDG INDUSTRY WC FUND	)	
Insurance Carrier	)	

ORDER

Respondent and its insurance carrier (respondent) request review of the February 24, 2010 Order for Compensation entered by Administrative Law Judge Brad E. Avery.

ISSUES

The Administrative Law Judge (ALJ) granted claimant's request for benefits after concluding claimant's accident arose out of and in the course of his employment. Simply put, the ALJ concluded that claimant's job compelled him to travel and took him to Enid, Oklahoma where he was struck by a drunk driver while walking back to his hotel. The ALJ ordered respondent to pay temporary total disability benefits, payment of all outstanding medical bills attached to the preliminary hearing transcript and ongoing medical treatment with Drs. Toby and Broghammer.

The Respondent requests review of this decision and argues the ALJ erred in concluding claimant's accident was compensable. Respondent argues that "[t]he plain and unambiguous language of K.S.A. 44-508(f) does not provide such exceptions to the going and coming rule and the ALJ's injection of such exceptions into the statute violates the rules of statutory constructed [sic] recently announced by the Kansas Supreme Court in

Casco[1], *Graham*[2] and *Bergstrom*.[3] Respondent maintains the claimant's employment did not place him at any increased risk because he was not required to be at the location at the time of the accident/assault.[4] Thus, respondent contends the ALJ's Order should be reversed and claimant should be denied any workers compensation benefits.

Claimant argues that the ALJ should be affirmed in all respects.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the whole evidentiary record filed herein, the undersigned Board Member makes the following findings of fact and conclusions of law:

The parties do not dispute the underlying facts of this claim. They do, however, disagree upon whether these facts give rise to a compensable injury. There is no dispute that claimant was injured when, as a pedestrian, he was struck by a drunk driver while walking back to his hotel. Claimant, who resides in the Hutchinson, Kansas area, along with a number of other coworkers were in Enid, Oklahoma working on a large roofing project. Claimant had gone to a nearby bar for drinks. As he was walking back he was run down by a drunk driver. His injuries were extensive and among other things, included an amputation of his right leg and the loss of sight in one eye.

How claimant came to be in Enid, Oklahoma at the time of his accident is uncontroverted. Claimant is a laborer employed to work on commercial roofing projects. Respondent had a large project in Enid, Oklahoma and told its employees that it would require overnight stays during the week. The workers would leave on Monday mornings, travel in company trucks from Hutchinson, Kansas to Enid, Oklahoma arriving approximately at noon. They would work Monday afternoon, all day each day thereafter until noon on Friday and then return to Hutchinson for the weekend. All meals and hotel costs were paid for by respondent. The workers, including claimant, were also provided with a $25 per diem for each night spent in the hotel and at the conclusion of the project, if completed in a timely fashion, the workers would be given a bonus. This was a typical arrangement for respondent's workers as it was common for this company to work on large projects far from Hutchinson, Kansas.

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[1] *Casco v. Armour Swift-Eckrich*, 283 Kan. 508, 154 P.3d 494 (2007).

[2] *Graham v. Dokter Trucking Group*, 284 Kan. 547, 161 P.3d 695 (2007)

[3] *Bergstrom v. Spears Manufacturing Company*, 289 Kan. 605, 214 P.3d 676 (2009).

[4] Respondent's Brief at 9 (filed Mar. 12, 2010).

If claimant had wanted, he could have used his own vehicle to commute to and from the job site, but his mileage or expenses would not have been reimbursed.[5] There is also evidence that working on this job was voluntary and that claimant could have refused to travel to Enid.[6] The workers were paid only for those hours they were actually working. At the conclusion of the workday, all the workers would travel back to the hotel where dinner was provided and then the laborers were on their own for the evening. Although respondent made an effort to have its workers stay in a hotel without a bar, there was no rule against walking to a nearby hotel bar.

The ALJ noted the provisions of K.S.A. 44-508(f), typically referred to as the going and coming rule as well as some of the well established exceptions: 1) the premises exception, 2) the special hazard exception, and 3) the exception for accidents which occur where the coming and going is an incident of the employment itself.[7] He went on to note:

> Under the "incident of employment" exception to the going and coming rule, injuries incurred while going and coming from places where work-related tasks occur can be compensable where the traveling is either (a) intrinsic to the profession or (b) required in order to complete some special work-related errand or special-purpose trip in the scope of employment. (Citation omitted)
>
> Where employment requires travel from place to place in the discharge of the employee's duties, an injury which occurred while traveling is an exception to the "going and coming rule." (Citations omitted) In *Blair v. Shaw*, 171 Kan. 524, 233 P.2d 731 (1951), the Court held that when a business trip is an integral part of the claimant's employment the "entire undertaking is to be considered from a unitary standpoint rather than divisible." *See also*, IA Larson, *The Law of Workmen's Compensation*, Sec.25.21(a) at 5-281 (1996) which states:
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> > "As to (1) traveling employees, whether or not on call, usually do receive protection when the injury has its origin in a risk created by the necessity of sleeping and eating away from home. The hotel-fire cases are the best illustration of this. Closely related are the injuries sustained in the process of getting meals. So when a traveling man slips in the street or is struck by an automobile between his hotel and a restaurant the injury has been held compensable...."[8]

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[5] Lemen Depo. at 30.

[6] *Id.* at 27.

[7] ALJ Order (Feb. 24, 2010) at 2, citing *Brobst v. Brighton Place North*, 24 Kan. App. 2d 766, Syl. 2, __ P.2d ___ (1997).

[8] *Id* at 2-3.

In finding the claimant's accident compensable, he offered the following analysis:

> It is the finding of the Court the claimant was exposed to the intoxicated driver who struck him because of a hazard created by the conditions of his employment, to wit, the necessity of travel to a city outside the borders of his residence. While it may be argued that Mr. Atkins left the Baymont motel at his own discretion, the hazards associated with travel have generally been regarded as indivisible. *See Blair v Shaw*, op. cit.. When travel is considered part of the job, the hazards associated with the duties of the job continue beyond, in this case, those associated specifically with roofing.[9]

Respondent argues that the ALJ's analysis of the law is in error. First, it contends that the travel or "incident of employment" exception to the "going and coming" rule is a judicially created exception and, applying the strict literal construction rule of *Bergstrom*, should no longer be precedential. Respondent also maintains that claimant's employment "did not create the hazard resulting in the assault or increase the risk of injury of the [c]laimant being assaulted.[10] Rather, it was claimant's decision to leave the hotel where he was staying, walk to the nearby hotel, have drinks and then walk home, exposing himself to the drunk driver. Moreover, respondent believes claimant was at no more greater risk than anyone else at the time of his accident because the circumstances of his accident have no connection to his work activities.[11]

Respondent suggests this factual scenario is more akin to that found in *Ostmeyer*[12] in which compensation was denied for an assault that occurred in the parking lot of a hotel where the claimant was living while working on an extended assignment away from her home.

This member of the Board has considered the parties' arguments and concludes the ALJ's Order should be affirmed. First, this Member disagrees with respondent's contention that the well established exceptions to the "going and coming" rule are no longer meaningful precedent. The integral travel and special purpose findings in the reported judicial cases were simply judicial determinations that the "going and coming rule" was not applicable because the workers in those cases were in the course of employment when the accidents occurred. Stated another way, the workers were not on the way to work because the travel itself was a part of the job. This distinction was accurately noted in the concurring opinion in *Halford* where it was stated in pertinent part:

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[9] *Id.* at 3.

[10] Respondent's Brief at 8 (filed Mar. 12, 2010).

[11] *Id.* at 9.

[12] *Ostmeyer v. The Right Solutions*, No. 1,030,022, 2009 WL 298341 (Kan. WCAB Jan. 30, 2009).

> I merely wish to add that the exception to the going-and-coming rule for travel that is intrinsic to the job is firmly rooted in the statutory language, even though many cases have referred to it as a judicially created exception. The statute provides that a worker is not covered "while the employee is on the way to assume the duties of employment." K.S.A. 44-508(f). Where travel is truly an intrinsic part of the job, the employee has already assumed the duties of employment once he or she heads out for the day's work. Thus, the employee is no longer "on the way to assume the duties of employment"-he or she has already begun the essential tasks of the job. Such an employee is covered by the Workers Compensation Act and is not excluded from coverage by the going-and-coming rule.[13]

Moreover, the *Bergstrom* case neither construed K.S.A. 2008 Supp. 44-508(f), nor overruled any cases that have interpreted that statute and is factually distinguishable. And like the ALJ noted, "[w]hen travel is considered part of the job, the hazards associated with the duties of the job continue beyond, in this case, those associated specifically with roofing."[14] Thus, under these facts, once claimant left Hutchinson, Kansas with his coworkers to travel to Enid, Oklahoma, claimant assumed the duties of his job and the entire undertaking is an indivisible one.

The distinction between this set of facts and those in *Ostemeyer* are easily seen. In *Ostemeyer*, that claimant was allowed to choose the hotel where she stayed and at one point even changed hotels due to personal reasons. She paid for her own room, albeit at a negotiated rate, and for all her meals and other expenses. She had her own car and was able to do whatever she wished when she was not working. She was assigned to that job for 13 weeks.

Here, claimant was provided with a hotel room, and assigned a roommate, at a hotel that he did not choose. He had no car available to him, other than a company truck to run only approved errands. He could not, under any circumstances, drive that vehicle to a bar. His employer knew he was walking to the nearby hotel for drinks and in fact, most of the other employees had done the same at one time or another during the course of this job. While it is true that claimant's decision to work on this job was a voluntary one, the record suggests that if an insufficient number of employees "volunteered" they would have been assigned to work this job. Finally, respondent's suggestion that claimant was not required to stay at the hotel and could have commuted between his home in Hutchinson, Kansas and Enid, Oklahoma, is disingenuous.

This Board Member concurs with the ALJ's analysis and affirms the preliminary hearing Order for Compensation.

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[13] *Halford v. Nowak Const. Co.,* 39 Kan. App. 2d 935, 186 P.3d 206, *rev. denied* ___ Kan. ___ (2008).

[14] ALJ Order (Feb. 24, 2010) at 3.

By statute, the above preliminary hearing findings and conclusions are neither final, nor binding as they may be modified upon full hearing of the claim.[15] Moreover, this review on a preliminary hearing Order may be determined by only one Board Member, as permitted by K.S.A. 2009 Supp. 44-551(i)(2)(A), as opposed to the entire Board in appeals of final orders.

WHEREFORE, it is the finding, decision and order of the undersigned Board Member that the Order of Administrative Law Judge Brad E. Avery dated February 24, 2010, is affirmed.

IT IS SO ORDERED.

Dated this _____ day of April 2010.

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JULIE A.N. SAMPLE
BOARD MEMBER

c: Melinda C. Young, Attorney for Claimant
Roy T. Artman, Attorney for Respondent and its Insurance Carrier
Brad E. Avery, Administrative Law Judge

[15] K.S.A. 44-534a.